

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODYName JOHN CANTY

(Last)

(First)

(Initial)

Prisoner Number K-32754Institutional Address California State Prison-Solano, Vacaville, CAP.O. Box-4000, 95696-4000**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**JOHN CANTY

(Enter the full name of plaintiff in this action.)

vs.

D.K. SISTO, WARDEN

(Enter the full name of respondent(s) or jailor in this action)

Read Comments Carefully Before Filing InWhen and Where to File

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b).

530 NEW
FILED
AUG 19 2008RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**PJH****CV****08****3965**

Case No.

(To be provided by the clerk of court)

**PETITION FOR A WRIT
OF HABEAS CORPUS****(PR)**

008-3965-PJH

1 Who to Name as Respondent

2 You must name the person in whose actual custody you are. This usually means the Warden or
3 jailor. Do not name the State of California, a city, a county or the superior court of the county in which
4 you are imprisoned or by whom you were convicted and sentenced. These are not proper
5 respondents.

6 If you are not presently in custody pursuant to the state judgment against which you seek relief
7 but may be subject to such custody in the future (e.g., detainees), you must name the person in whose
8 custody you are now and the Attorney General of the state in which the judgment you seek to attack
9 was entered.

10 A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

11 1. What sentence are you challenging in this petition?

12 (a) Name and location of court that imposed sentence (for example; Alameda
13 County Superior Court, Oakland):

14 Sup. Court of Calif. 1225 Fallon ST. Oakland
CA

15 Court Location

16 (b) Case number, if known 128432A and 122582B

17 (c) Date and terms of sentence 11/25/96/20 year Term

18 (d) Are you now in custody serving this term? (Custody means being in jail, on
19 parole or probation, etc.) Yes XXX No

20 Where?

21 Name of Institution: C.S.P. Solano, P.O. Box-4000, VAC. CA

22 Address: P.O. Box-4000, Vacaville, CA 95696-4000

23 2. For what crime were you given this sentence? (If your petition challenges a sentence for
24 more than one crime, list each crime separately using Penal Code numbers if known. If you are
25 challenging more than one sentence, you should file a different petition for each sentence.)

26 PC 215, Carjacking; PC 289 (a) Pen, With Foreign Object and
27 Oral Copulation, PC 288 (a)(d)
28 _____

petition? Yes _____ No XXX

(c) Was there an opinion? Yes _____ No XXX

(d) Did you seek permission to file a late appeal under Rule 31(a)?
Yes _____ No XXX

If you did, give the name of the court and the result:

9. Other than appeals, have you previously filed any petitions, applications or motions with respect to this conviction in any court, state or federal? Yes _____ No XXX

[Note: If you previously filed a petition for a writ of habeas corpus in federal court that challenged the same conviction you are challenging now and if that petition was denied or dismissed with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider this petition. You may not file a second or subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28 U.S.C. §§ 2244(b).]

(a) If you sought relief in any proceeding other than an appeal, answer the following questions for each proceeding. Attach extra paper if you need more space.

I. Name of Court: Superior Court of Alameda County

Type of Proceeding: Habeas Corpus

Grounds raised (Be brief but specific):

a. Trial Court acted in excess of it's Jurisdiction. (2). That in light of the recent decision
b. U.S. Supreme Court decision in Cunningham,
c. Plaintiff sentence must be reduced
d. _____

Result: Denied Date of Result: 3/19/07

II. Name of Court: First Appellate District

Type of Proceeding: Habeas Corpus

Grounds raised (Be brief but specific):

SAME AS (A) (1)

a. _____

b. _____

c. _____

d. _____

Result: Denied Date of Result: 5/24/07

III. Name of Court: Supreme Court For THE State OF CALIF.

Type of Proceeding: Habeas Corpus

Grounds raised (Be brief but specific):

SAME AS (A) (1)

a. _____

b. _____

c. _____

d. _____

Result: Denied Date of Result: 12/12/07

IV. Name of Court: _____

Type of Proceeding: _____

Grounds raised (Be brief but specific):

a. _____

b. _____

c. _____

d. _____

Result: _____ Date of Result: _____

(b) Is any petition, appeal or other post-conviction proceeding now pending in any court?

Yes _____ No xxx

Name and location of court: _____

B. GROUNDS FOR RELIEF

State briefly every reason that you believe you are being confined unlawfully. Give facts to support each claim. For example, what legal right or privilege were you denied? What happened? Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you

1 need more space. Answer the same questions for each claim.

2 [Note: You must present ALL your claims in your first federal habeas petition. Subsequent
3 petitions may be dismissed without review on the merits. 28 U.S.C. §§ 2244(b); McCleskey v. Zant,
4 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).]

5 Claim One: A fact used to aggravate or enhance Petitioner's term can
6 not perform double duty. A fact used to impose the upper term can
7 not be used to enhance a consecutive sentence, or any other term.
Supporting Facts:

8 The U.S. Supreme Court in it's recent ruling; Cunningham v. Calif.
9 made it clear that a fact use in aggravation, cannot be used to
10 enhance the term as well as cited in Calif. Rules of Court 4.420

11 Claim Two: Trial court sentence Petitioner to an illegal sentence,
12 when they sentence Petitioner in excess of their jurisdiction.

13 Supporting Facts: Trial court violated petitioner's due process under the
14 14th Amendment guarantee, by sentencing him in excess of their
15 jurisdiction, and under the Calif. Rule of Court Rule 4.420 (c)(e)

16 P.C. 1170 (b), Trial court is prohibited from using the same fact.

17 Claim Three: Petitioner cannot bargain for an illegal sentence.

18
19 Supporting Facts: When a plea is induced by trial defense counsel, who
20 knew nothing of relevant sentencing laws. There can be no bargain to
21 an illegal sentence. it has been held an attorney can be ineffective
22 by giving a defendant false information about sentencing.

23 If any of these grounds was not previously presented to any other court, state briefly which
24 grounds were not presented and why:

1 John Canty
K-32754
2 California State Prison-Solano
P.O. Box-4000
3 Vacaville, CA 95696-4000
4

5 IN THE CALIFORNIA COURT OF APPEALS
6 FIRST APPELLATE DISTRICT

7 In Re JOHN CANTY
8 On Writ of Habeas Corpus
9

10 Petitioner John Canty, pro se prisoner, filed this instant petition
11 of Writ of Habeas Corpus in the Superior Court of California, County of
12 Alameda on 3/6/2007 , and it was denied on 3/19/2007 .

13 Petitioner motion for reconsideration was filed with the Superior
14 Court of California on April 12, 2007, and was denied April 13, 2007.

15 Petitioner now comes before this court for review and relief sought
16 in his petition for Writ of Habeas Corpus, and ask this court to take
17 judicial notice to the following facts entered in his petition for Writ
18 of Habeas Corpus.

19 On January 22, 2007, the United States Supreme Court rule that
20 California's determinate sentencing law (DSL) unconstitutional by placing
21 sentencing elevating factfinding within the judge's province, violate's
22 a defendant's right to a trial by jury safeguard required by the First
23 and Fourteenth Amendments of the United States Constitution. The court
24 has repeatedly held that "any" fact that exposes a defendant to a greater
25 potential sentence must be found by a jury, and not a judge; and established
26 beyond a reasonable doubt. (530 U.S. at 490, see also Harris v. U.S., 545
27 557-566 (2002). (See petitioner's Writ of Habeas Corpus attached).

28 Here the petitioner was sentence to the upper term of 8 years to

1 run consecutively with an additional 5 and 7 year sentence. Under
2 California Rules of Court, Rule 4.412, which states:

3 Defendant's agreement as reason]it is adequate reason for
4 a sentence or other disposition that the defendant personally
5 and by counsel, has expressed agreement that it be imposed
6 and the prosecuting attorney has not expressed an objection
7 to it. The agreement and lack of objection shall be recited
8 on the record.

9 This section does not authorize a sentence that is not
10 otherwise authorized by law. Calif. Rules of Court, Rule 4.412
11 as amended effectively January 1, 2001.

12 Defendant cannot bargain for an illegal sentence. An attorney who
13 does not know the basic sentence for an offense at the time that his client
14 is contemplating entering a plea is ineffective, even if trial court and
15 prosecution are also ignorant of relevant changes in the law. Had the
16 attorney known of the sentencing amendment he would have had the professional
17 duty to alert the State and the Court of the amendment, because defendant
18 cannot bargain for an illegal sentence. See e.g. In Re Norton, 128 N.J. 520;
19 608 A. 2d 328,338 (N.J.1992); State v. Nemeth, 214 N.J. Super. Ct. App. Div.
20 1986., there can be no plea bargain to an illegal sentence. The United
21 States Supreme Court has held that an attorney can be ineffective by giving
22 a defendant false information about sentencing, thereby inducing the defendant
23 to plead guilty instead of going to trial. See Myers v. Gillis, 142 F. 3d 664,
24 (3rd Cir. 1998). Defense counsel, as well as the prosecution must know or
25 learn about relevant facts of sentencing. The Eighth Amendment bars a prison
26 sentence beyond the legislatively created maximum. See Ralph v. Blackburn,
27 590 F. 2d 1335,1337 n. 3 (5th Cir. 1979).

28 The Superior court's decision in denying the petitioner petition of

1 Writ of Habeas Corpus, that Cunningham did not apply retroactively
2 to the petitioner's case. The court did not consider the facts
3 and law that the petitioner's sentence was an unauthorized sentence.
4 sentence.

5 As a general rule, acts of court taken wholly without the
6 power to do so may be collaterally attacked at any time without
7 regard to a statute of limitation. (See e.g. *Armstrong v. Armstrong*,
8 *Armstrong*, (1976) 15 Cal. 942, 950, [126 Cal. Rptr. 805; 544 P. 2d
9 941].

10 Acting in excess of jurisdiction, this aspect of the Habeas
11 Corpus jurisprudence has been invoked in the past by courts to
12 review claims that a criminal defendant was sentence to serve an
13 illegal sentence. Thus for an example, where a defendant was
14 sentence to an indeterminate term when the law provides a
15 determinate term. See *In Re Lee*, 177 Cal. 690; [171 P. 958].

16 Likewise, the Writ was available to review claims that the
17 sentencing court acted in excess of it's jurisdiction by imposing
18 a sentence on petitioner that was longer than permitted by law.
19 (*Neal v. California*, 55 Cal. 2d 11, 16-17; *Estrada*, 63 Cal. 2d 740,
20 750; *In Re Huffman*, 42 Cal. 3d 551, 555.

21 The statutory maximum, the United States Supreme Court has
22 clarified, "is not the maximum sentence a judge may impose after
23 finding additional facts...." But the maximum the judge may impose
24 without any additional finding. THEREFORE, the statutory maximum
25 is the middle term, and not the upper term sentence. (See
26 *Cunningham v. California*, (2007), 549 U.S. ____.: *Apprendi v. New*
27 *Jersey*, (2000), 530 U.S. 466; *Balkely v. Washington*, (2004) 542
28 U.S. 296.

1 It should be noted that it is unconstitutional to remove
2 from the jury the assessment of facts that increases the precise
3 range of penalties to which a criminal defendant is exposed. It
4 is equally clear that such facts be established beyond-a-reasonable
5 doubt.

6 The Supreme Court of the United States asserted in *Shepherd*
7 *v. U.S.*(2005), 544 U.S. 13,24-26, that a sentencing court may not
8 look at police reports and complaint applications to determine
9 whether prior offenses may trigger the upper term, and essentially
10 must be limited to what the defendant with a true effective counsel
11 has admitted to in front of the judge. Thus the judge must stick
12 to the legal facts and what the high court held, that they may only
13 examine the statutory definition of the charged offense.(reversing
14 *Taylor v. U.S.* 495 U.S. 575 (2000).

15 This right, has due process underpinnings. It is addressed
16 to the actions of the court.(*Evitts* 469 U.S. 396, quoting *Cuyler*
17 *v. Sullivan* 100 S. Ct. 1708 (1980), in obtaining a criminal
18 conviction through a procedure that fails to meet the standard of
19 due process of law"unless a defendant charged with a serious
20 offense has counsel able to invoke the procedural and substantive
21 safeguards that distinguishes our system of justice. A serious
22 risk of injustice infects the trial itself. Accordingly under the
23 California Rules of Criminal Procedure that applies to this case,
24 the court can correct an illegal and unauthorized sentence "at any
25 time". This authority to vacate and amend a sentence at any time
26 extends only to the illegal portion of the sentence and does not
27 empower the court to reach the legal sentence, previously imposed,
28 even when it arose out of the same transaction. (*Henry* at 709 f. 2d

1 308(citing Kennedy 330 F. 2d 27)).

2 Therefore, the question of whether or not the Cunningham
3 decision is retroactive to the petitioner's unauthorized sentence,
4 because defendants cannot bargain for an illegal sentence, does
5 not resolve this case. A claim that a sentence is unauthorized
6 is subject to judicial correction whenever the error comes to the
7 attention of the reviewing court.(People v. Scott, 9 Cal. 4th
8 331,354).

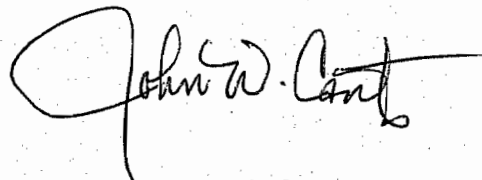
9 WHEREFORE, petitioner respectfully request that this court
10 issue and order for the following.

11 !. Reverse their judgement and remand petitioner for re-
12 sentencing.

13 2. Issue and order to show cause.

14 3. Issue an order for any other relief that the court deems
15 significant.

16 Executed this day of May 10th, 2007

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20 Respectfully Submitted
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IN LIGHT OF THE RECENT DECISION OF THE
UNITED STATES SUPREME COURT IN CUNNINGHAM
V. CALIFORNIA, APPELLANT SENTENCE MUST
BE REDUCED.

The recent decision of the United States Supreme Court, makes the California's determinate sentencing law (DSL), unconstitutional by placing sentencing elevating factfinding within the judge's province, violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments. As this court's decision instruct, the Federal Constitution's jury-trial guarantee proscribes a sentence scheme that allows a judge to impose a sentence above the statutory maximum based on facts, other than a prior conviction, not found by a jury or admitted by the defendant. Apprendi v. New Jersey, (2000) 530 U.S. 466; Ring v. Arizona, (2002) 536 U.S. 584; Blakely v. Washington, (2004) 542 U.S. 296; United States v. Booker, (2005) 543 U.S. 220.

The court has repeatedly held, that under the Sixth Amendment, "Any", fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge; and established beyond-a-reasonable-doubt, and not the ballwick of a judge determining where the preponderance of the evidence lies. 530 U.S. at 490, See also Harris v. U.S. 545, 557-566, (2002).

Here, Petitioner was sentence to the upper term (doubled and then enhanced again). Under California's determinate sentencing law (DSL) which sets out an upper, middle and lower term sentence, the trial court must impose the middle term unless it finds and states orally on the record the fact that constitute circumstances in aggravation or mitigation, and in it's view justify imposing the upper or lower term sentence. See Penal Code §1170 subd. (b); Calif. Rules of Court,

1 Rule 4.420 subd. (e).

2 [T]he statutory maximum, this court has clarified," is not the
3 maximum sentence a judge may impose after finding additional facts,
4 "but the maximum he may impose without any additional finding." See
5 Blakely 542 U.S. at 303-304. Therefore, the statutory maximum is the
6 middle term, and not the upper term sentence. Blakely 542 U.S. 296;
7 U.S. v. Booker, 543 U.S. 220; Cunningham, 549 U.S. ____.

8 Any fact used to deviate from the middle term must be establish
9 by a reasonable doubt of the evidence, as shown by the facts develop
10 at trial, probation report, statements in aggravation or mitigation,
11 and evidence introduced at the sentencing hearing. Calif. Rules of
12 Court, Rule 4.420 subd. (b). A trial judge, at sentencing, thus has
13 two very different roles: First, as a finder of facts, he determines
14 and specifies circumstances in aggravation or mitigation, based on
15 trial evidence received at the sentencing hearing, including the pre-
16 sentence report and on occasion, live testimony. Then he exercise
17 his discretion as to whether the proved facts and circumstances of
18 the case justify imposition of other than the middle term, if the
19 defendant is sent to prison.

20 Clearly, judicial factfinding that serves as a basis for an
21 increased prison term is no longer permissible under the Sixth and
22 Fourteenth Amendments of the United States Constitution. In Blakely
23 v. Washington, (2004) 542 U.S. 296, the United States Supreme Court
24 held pursuant to Apprendi v. New Jersey, (2000) 530 U.S. 466, "Any",
25 aggravating fact that increases a prison term beyond that which could
26 be lawfully imposed if no such facts were found must be tried to a
27 jury, unless the right to a jury trial of such facts is waived.

1 Where the jury verdict alone would not permit a particular sentence
2 absent the findings of a specified additional fact or facts, that
3 sentence cannot be upheld.

4 Clearly California's law does not authorize imposition of the
5 upper of three terms unless the judge finds, and states on record,
6 aggravating or mitigating facts that supports imposition of the
7 upper or lower term sentence. Therefore, under Blakely, as well as
8 U.S. v. Booker, Cunningham and Apprendi, no upper term sentence may
9 be imposed based of facts found by a judge.

10 REVERSAL OF THE UPPER TERM IS MANDATORY:

11 As with Apprendi, imposition of the upper term based on findings
12 made by a judge that should have been made by a jury is structural
13 error. No matter how overwhelming the evidence, where the defendant
14 was denied his right to a jury trial, a sentence based on judicial
15 factfinding must be reversed. See Sullivan, (1993) 508 U.S 275, 277;
16 People v. Taylor, (2004) 118 Cal. App. 4th 11, 30. The argument
17 could be made that the court could simply strike any factor in
18 aggravation that should have been found by a jury and allow the
19 sentence to stand based on criminal history factors that a judge
20 may still properly find. But this argument fails for three reasons:

21 First, the reasoning in Blakely cast severe doubt whether a
22 judge may find a prior conviction to be true without a jury's
23 waiver; Second, even if the petitioner's prior conviction is an
24 undisputable fact, whether that record is an aggravating factor
25 depends on the judgement of the jury, not a judge.

26 Penal Code §1170 subd. (b), control the trial judge's choice;
27 it provides that the court shall order the imposition of the middle
28

1 term unless there are circumstances in aggravation or mitigation of
2 the crime. Circumstances in aggravation or mitigation are to be
3 determined by the court after consideration of several items: The
4 trial record, probation report, statements in aggravation or mitiga-
5 tion, and further evidence introduced at the sentencing hearing.

6 Notably, the Penal Code permits elevation of a sentence above
7 the upper term based on specified statutory enhancements relating
8 to the defendant's criminal history, or circumstances of the crime.
9 See Penal Code §667; also see Black, 35 Cal. 4th at 1257. Unlike
10 aggravating circumstances, statutory enhancements must be charged
11 in the indictment, and the underlying fact must be proved to a jury
12 beyond a reasonable doubt. Penal Code §1170.1 (e); Black 35 Cal.
13 4th at 1257. A fact underlying an enhancement cannot do double duty,
14 it cannot be used to imposed the upper term sentence, and on top of
15 that, an enhanced term too. Penal Code §1170 (b).

16 Here, Petitioner was sentence to the upper term of 8 years,
17 to run consecutive with a 5 and 7 year middle term sentences.

18 Defendant's agreement as reason] it id adequate reason for a
19 sentence or other disposition that the defendant, personally and by
20 counsel, has expressed agreement that it be imposed and the prose-
21 cuting attorney has not expressed an objection to it. The agreement
22 and lack of objection shall be recited on the record. This section
23 does not authorize a sentence that is not otherwise authorized by
24 law. Calif. Rules of Court, Rule 4.412; as amended effective January
25 1, 2001. Had the court attempted to do directly what they did indi-
26 rectly, that is impose a sentence not authorized by law for the
27 offense of which Petitioner was convicted. The law is well settled

1 that such a sentence would have been subject to judicial correction
2 whenever the error came to the attention of the trial court or the
3 reviewing court. See In Re Sandel, (1966) 64 Cal. 2d 412; [50 Cal.
4 Rptr. 462; People v. Massengate, (1970) 10 Cal. App. 3d 689, 692, [89
5 Cal. Rptr. 237.

6 An error which infringes a Federal Constitutional right compel
7 reversal, unless the reviewing court is able to declare a belief
8 that it was harmless beyond-a-reasonable-doubt. See Chapman v.
9 California, (1967) 386 U.S. 18, 24; [17 L. Ed. 2d 705, 710-711.

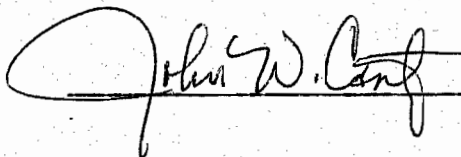
10 Therefore, upon full consideration of this issue. This court
11 should reverse Petitioner's conviction and remand the matter for
12 re-sentencing.

13 CONCLUSION

14 For the forgoing reasons set forth in this petition. The upper
15 term sentence must be reversed and petitioner should be remanded
16 for re-sentencing consistent with the recent ruling decided by the
17 United States Supreme Court in their decision in Cunningham v.
18 California, 549 U.S. _____, decided January 22, 2007.

19 Dated MAY 10th, 2007

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22 RESPECTFULLY SUBMITTED

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1 Mr. John Canty
2 # K-32754
3 California State Prison-Solano, Level #2
4 P.O. Box-4000
5 Vacaville, CA 95696-4000

6
7 IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA
8 IN AND FOR THE COUNTY OF ALAMEDA

9 JOHN CANTY

Case No.1284432A

10 vs.

11 D.K. SISTO, WARDEN

Petitioner's
Motion For Reconsideration
of Petition For Writ of Habeas
Corpus, Denied, March 16, 2007

12
13 Petitioner John Canty, filed a petition for Writ of Habeas Corpus in
14 this court. This court summarily denied his petition for Writ of Habeas
15 Corpus on March 16, 2007, finding that the Cunningham v. California (2007)
16 549 U.S._____, decision is not retroactive to petitioner's sentencing in,
17 Case No.1284432A.

18 A motion for reconsideration is the exclusive means for modifying,
19 amending or revoking an order. Morite of Cal. et al. v. Superior Court,
20 (1993) 19 Cal. App. 4th 485,490.) The motion for reconsideration must be
21 based on new or different facts,circumstances or law. Cal. Code Civ. Proc.
22 §1008 (a).

23 Although, petitioner contends in his Habeas petition that the sentencing
24 court could have not impose the upper term enhancement, and relied on the
25 Cunningham decision, the court did not consider in it's decision denying the
26 petition the fact and law that petitioner's sentence was an unauthorized
27 sentence. In Re Harris,(1993) 5 Cal. 4th 813,838-841; Acting in access of
28 jurisdiction. This aspect of Habeas Corpus jurisprudence has been invoked

1 in the past by the court to review claims that a criminal defendant was sentence
2 to serve an illegal sentence. Thus fir an example, where a defendant was
3 sentence to an indeterminate term when the law provided for a determinate term.
4 Habeas Corpus was available.(In Re lee, (1918) 177 Cal. 690,[171 P. 958]. The
5 writ like wise was available to review claims that the sentencing court acted
6 in excess of it's jurisdiction by imposing a sentence on petitioner that was
7 longer than permitted by law.(Neal v. State of California,(1960) 55 Cal. 2d 11,
8 16-17,[9 Cal. Rptr. 607;[357 P.2d 839] see also Estrada,(1965) 63 Cal. 2d
9 740,750;[48 Cal. Rptr. 172;[408 P.2d 948]; In Re Huffman,(1986) 42 Cal. 3d 551,
10 555;[229 Cal. Rptr. 789;724 P. 2d 475]). In Re Harris,(1989) 49 Cal. 3d 131;
11 260 Cal. Rptr. 288;[775 P. 2d 1957]).

12 As a general rule, act's of court under taken wholly without the power to
13 do so may be collaterally attacked at any time with out regard to a statute
14 of limitations. (see, e.g. Armstrong v. Armstrong,(1976) 15 Cal. 3d 942,950;
15 126 Cal. Rptr. 805;[544 P.2d 941]. The unauthorized sentence principle has
16 been invoked to determine whether claims previously rejected or never raised
17 are procedurally barred on Habeas Corpus. (In Re Harris,(1993) 5 Cal. 4th 813,
18 838-841.

19 Therefore, the principles are invoked as a matter of policy to insure the
20 fair and orderly administration of justice. (cf. Cal. Evid. Code §§353,354,
21 [preserving evidentiary claims]. Although the claims are varied, a sentence is
22 generally "unauthorized" when it could not lawfully be imposed under any
23 circumstances in the particular case.

24 A claim that a sentence is unauthorized, however, is subject to judicial
25 correction whenever the error comes to the attention of the reviewing court.
26 (People v. Scott,(1994) 9 Cal. 4th 331, 354.)

27 Therefore, the question of whether the Cunningham decision is retroactive
28 to petitioner's unauthorized sentence in case no.1284432A,does not resolve this case.

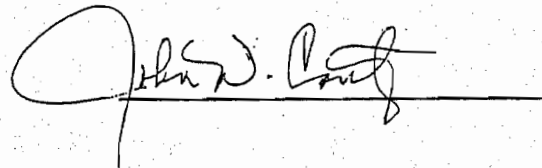
1 case.

2 May this court reconsider the petition for Writ of habeas Corpus, and
3 issue and order to show cause.

4
5 I, John Canty, the petitioner, say and declare under the penalty of perjury
6 that the foregoing is true and correct.

7 Executed on this date April 4, 2007, at California State Prison-Solano,
8 P.O. Box-4000, Vacaville, CA 95696-4000.

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10 RESPECTFULLY SUBMITTED

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1 List, by name and citation only, any cases that you think are close factually to yours so that they
2 are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning
3 of these cases:

4 People v. Riolo, (1983; 33 Cal. 3d 223; People v. Keys,
5 220 Cal. Rptr. 760; 175 Cal. App. 3d 431; In Re Jone, (1994)
6 27 Cal. App. 4th 1153; People v. Cropper, (1975), 89 Cal. App.
7 3d. 716; People v. Diaz, (2007) Cal. App. Lexis 655

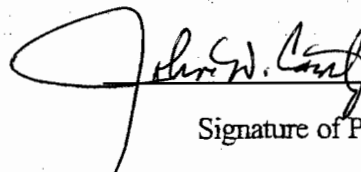
8 Do you have an attorney for this petition? Yes _____ No XXX

9 If you do, give the name and address of your attorney:

10 WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in
11 this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

12 Executed on August 12th 2008

13 Date

14 

15 Signature of Petitioner

16
17
18
19
20 (Rev. 6/02)

S154080

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JOHN CANTY on Habeas Corpus

The petition for writ of habeas corpus is denied.

**SUPREME COURT
FILED**

DEC 12 2007

Frederick K. Ohlrich Clerk

Deputy

GEORGE

Chief Justice

Richard I. May 20 2008
92
COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

FILED

In re JOHN CANTY on Habeas Corpus.

MAY 24 2007

A117705

Court of Appeal - First App. Dist.
DIANA HERBERT

Alameda County No. 128432A

By _____
DEPUTY

BY THE COURT.*

The petition for writ of habeas corpus is denied. (See *People v. Amons* (2005) 125 Cal.App.4th 855, 868; see also *United States v. Sanchez-Cervantes* (9th Cir. 2002) 282 F.3d 664, 669-671.)

Date MAY 24 2007

SIMONS, J.

Acting P.J.

* Before Simons, Acting P.J., Gemello, J. and Needham, J.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Dept. No. 9

Date: March 16, 2007

Hon. LARRY J. GOODMAN, Judge

Fil R. Cruz, Deputy Clerk.
Not Reported, Reporter

IN RE

JOHN WILLIAM CANTY

Counsel appearing No Appearance
for Petitioner

Petitioner

vs.

Counsel appearing No Appearance
for RespondentPEOPLE OF THE STATE OF CALIFORNIA
RespondentNature of Proceedings: **ORDER OF THE COURT**
REGARDING PETITION FOR WRIT OF HABEAS CORPUSCase No. 1284432A
PFN: AJR164
CEN: 6152681

Petition for writ of habeas corpus is denied. The Petition fails to state a prima face case for relief. The Apprendi/Blakely/Cunningham line of cases do not apply where the Petitioner has agreed to a specific term of imprisonment and the Court uses the aggravated term to reach the term the Petitioner has agreed to. Petitioner entered into a plea agreement wherein Petitioner agreed to a state prison sentence of 20 years. It was indicated at the time of Petitioner's plea that the imposition of the aggravated term of 8 years for Count 3 would be part of the terms used to achieve the 20 year state prison sentence. Petitioner was fully advised regarding the terms of the plea agreement and he agreed to the terms. At the time of Petitioner's sentencing the Court stated that the sentence was imposed pursuant to the Court's authority under California Rules of Court 4.412, (previously 412). The Petitioner was fully and properly advised of all of his rights. He suffered no violation of any rights to due process.

In addition Petitioner's case was final in 1996. Apprendi became final in 2000 and Blakely became final in 2004. The Petitioner's case predates both of these cases and is therefore not applied retroactively to Petitioner's case.

CLERK'S CERTIFICATE OF MAILING

I certify that the following is true and correct: I am the clerk of the above-named court and not a party to this cause. I served **ORDER OF THE COURT** by placing copies in envelopes addressed as shown below and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

John Canty
CDC or ID Number K-32754
California State Prison - Solano
P.O. Box 4000
Vacaville, CA 95696-4000

Dated: March 19, 2007

By: Fil R. Cruz
Fil R. Cruz, Deputy Clerk

Writ - Canty, John 128432a

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Dept. No. 9

Date: **April 13, 2007**

Hon. LARRY J. GOODMAN, Judge

Fil Cruz, Dep. Clk.

Not Reported, Reporter

IN RE:

JOHN CANTY

Petitioner

Counsel appearing
for Plaintiff

No Appearance, Deputy
District Attorney

vs.

Counsel appearing
for Defendant

No Appearance

PEOPLE OF THE STATE OF CALIFORNIA

Respondent

Nature of Proceedings: **EX PARTE HEARING
REGARDING MOTION FOR RECONSIDERATION**

Case No. **128432A**
PFN: **AJR164**
CEN: **6152681**

This Court, having reviewed the Motion for Reconsideration of Petition for Writ of Habeas Corpus filed April 12, 2007 by Petitioner JOHN CANTY ("Petitioner"), NOW HEREBY ORDERS:

Motion for reconsideration is denied.

CLERK'S CERTIFICATE OF MAILING

I certify that the following is true and correct: I am the clerk of the above-named court and not a party to this cause. I served **ORDER OF THE COURT** by placing copies in envelopes addressed as shown below and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

John Canty
CDC or ID Number K-32754
California State Prison - Solano, *LEVEL #2*
P.O. Box 4000
Vacaville, CA 95696-4000

Dated: *April 13, 2007*

By: *[Signature]*

Fil R. Cruz, Deputy Clerk

August 15, 2008
John Wm. Canty - #K3Z754
C.S.P. Solano - Bldg. #20/GZL
P.O. Box 4000
VACAVILLE, CA 95696-4000

United States District Court (FEDERAL)
Northern District of California
450 - Golden Gate Avenue
San Francisco, CA. 94102-3483

PJH

CV 08

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Dear Clerk of the Court,

I am submitting a petition of Writ of Habeas Corpus. (PR)
I am presently incarcerated (in a California State Prison, at
Solano in Vacaville Ca.) and due to my indigency and
policy of the CDCR, I cannot provide the required
number of copies (as required by the Rules of Court)...
And I am asking you to accept this Writ, along with
an additional copy, but stamp & file one as my
own copy, and return it to me? - In addition to
any additional copies necessary to serve other parties.

Please, send me a conformed copy as a receipt of
filing, I do apologize for any inconvenience which
this may have caused.

Respectfully submitted,

John W. Canty

LEGAL MAIL

John M. Darity - # K32754
CSP / Solano - Bldg. # 20
P.O. Box 4000
Fresno, California
95102-4000



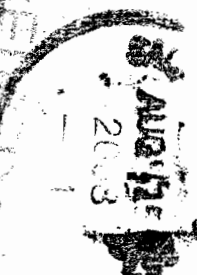
CALIFORNIA STATE PRISON-SOLANO

United States District Court
Northern District of California
450 - Golden Gate Avenue
San Francisco, California
94102-3483

RICHARD W. WELING
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

AUG 18 2008

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RECEIVED

AUG 18 2008

U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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S. Dineen 8/14/08

LEGAL MAIL